Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1979

No. **79-2036**

JOHN F. FARRI, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner John F. Farri, Jr. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered May 27, 1980, affirming the denial of his motion for withdrawal of his plea of guilty, before sentence, pursuant to Rule 32(d), Federal Rules of Criminal Procedure, and that on hearing, denial of such motion be reversed.

OPINIONS BELOW

The opinion of the court of appeals is not reported, nor is the opinion of the district court.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1980. Federal jurisdiction is based on violations of 18 U.S.C. §§1341 and 1342. This Court has jurisdiction under 28 U.S.C. §1254(a).

QUESTION PRESENTED

Whether it was an abuse of discretion for the trial court to deny petitioner's notice of motion for withdrawal of his plea of guilty pursuant to Rule 32(d), Federal Rules of Criminal Procedure, where such motion was made prior to sentence and where there was no finding of prejudice to the government, and petitioner claimed he was innocent of the charges.

PERTINENT RULE INVOLVED

Rule 32(d), Federal Rules of Criminal Procedure: *Withdrawal of Plea of Guilty.*

> "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

STATEMENT OF THE CASE

On March 3, 1979, petitioner was indicted for nine counts of mail fraud in violation of Title 18 U.S.C. §§1341 and 1342 in connection with the alleged arson of his residence (Appendix A, *infra*). A not guilty plea was entered on April 27, 1979. The morning of the scheduled trial, September 17, 1979, pursuant to a negotiated plea bargain, petitioner pled guilty to the First

Count of the Indictment, with the understanding that the remaining counts would be dismissed at sentence. Sentencing was scheduled for October 26, 1979. On October 24, 1979, a motion to withdraw the guilty plea was filed pursuant to Federal Rules of Criminal Procedure, Rule 32(d). Petitioner's motion was denied on November 9, 1979 subsequent to an evidentiary hearing. On November 16, 1979, petitioner was sentenced to two years in custody. (The opinion of the district court is set forth as Appendix A.) Notice of appeal was filed on November 21, 1979. The judgment order of the United States Court of Appeals for the Third Circuit is set forth as Appendix B. The court held as follows:

> "After considering the contentions raised by appellant. . . that. . . denial of defendant's notice of motion to withdraw his plea of guilty before sentence was an abuse of discretion . . . it is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed."

Petitioner's understanding, in sum, was that he was persuaded to enter his guilty plea only because he believed it was a quick and expedient way for him to go home with his wife and in all probability escape a jail sentence (Appendix C, 12a-14a). There was much confusion at the time of the entry of the plea. Petitioner consistently maintained his position he was not guilty. His wife had told him to plead guilty to anything just as long as he would be able to come home with her (Appendix C, 14a). Petitioner had very little sleep on the morning that the plea was entered (Appendix C, 15a). Petitioner constantly maintained his innocence and his guilty plea was entered only as a matter of expediency (Appendix C, 11a, 14a).

Petitioner seeks review of the judgment of the Third Circuit Court of Appeals herein so that on hearing said order may be reversed and petitioner's motion to withdraw his guilty plea be granted.

REASONS FOR GRANTING THE WRIT

The trial court's denial of petitioner's notice of motion to withdraw his plea of guilty before sentence pursuant to Federal Rules of Criminal Procedure, Rule 32(d), was an abuse of discretion where petitioner claimed he was innocent of the charges and there was no finding of prejudice to the government. The failure of the Third Circuit to correct this unusual departure from the applicable standard requires the exercise of this Court's supervision under Rule 19(b). The trial court failed to properly apply the standards as set forth in *United States v. Stayton,* 408 F.2d 559 (3rd Cir. 1969), the landmark decision of the Third Circuit. The court there held that withdrawal of a guilty plea prior to sentence should be freely allowed. The standard to be applied is that of fairness and justice, 408 F.2d at 560, 561, and was adopted from the dictum in *Kercheval v. United States,* 374 U.S. 220 (1927). The Court stated that a trial court in the exercise of its discretion should permit an accused to substitute a plea of not guilty and have a trial, if for any reason the granting of the privilege seems fair and just.

United States v. Young, 424 F.2d 1276 (3rd Cir. 1970), held that a trial judge abuses his discretion in not permitting a motion to withdraw when a defendant indicated that he did not truly understand that the facts he is prepared to admit constitute the offense charged and when there is no prejudice to the government from withdrawal. The *Young* court reaffirmed the principles set forth in *United States v. Ptomey,* 366 F.2d 759 (3rd Cir. 1966) in that the liberal rules for withdrawal were consistent with the efficient administration of criminal justice.

In essence, there has been a deviation from the liberal application of rules for withdrawal as interpreted by the Third Circuit.

The passage of time should not preclude withdrawing the plea under Rule 32(d). There is no express time limit under this

rule. *See United States v. Washington*, 341 F.2d 277 (3rd Cir. 1965), *cert. denied sub nom. Bergregory v. United States*, 382 U.S. 350 (1965) and *United States v. Fina*, 289 F. Supp. 288 (D.C. Pa. 1968) for a direct holding to this effect.

Further, the court specifically found that the denial of motion was not dependent in any way upon the government's assertion of resulting prejudice (Appendix A, 8a).

The motion transcript clearly indicates that petitioner felt he was innocent of the charges and that he entered the guilty plea solely to placate his wife and with the understanding he would be able to go home and at most pay a fine. Lack of sleep, confusion and haste were conditions attested to, surrounding the entry of the plea. Under these circumstances, it cannot be said the plea was freely entered and the standards set forth in *United States v. Stayton, supra,* must be applied.

Finally, it should be noted that it is not necessary for a defendant to allege that he is innocent of the crime charged in connection with his motion to withdraw, since such an application does not involve any question of guilt or innocence. *Kercheval v. United States*, 274 U.S. at 224. Therefore, the trial court erroneously considered petitioner's alleged lack of assertion of innocence in denying his motion for withdrawal (Appendix A, 5a).

CONCLUSION

For the reasons set forth above, petitioner requests that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

s/ JAN M. SCHLESINGER
Attorney for Petitioner

APPENDIX A — OPINION OF UNITED STATES DISTRICT COURT

"THE COURT: In the case of a presentence withdrawal motion such as this one, the rule, and by 'rule' I mean the applicable controlling rule here of the Federal Rules of Criminal Procedure, 32(D), is silent on the standard to be applied. However, our own federal courts have through the years uniformly established a common law rule that presentence withdrawal should be permitted when it would be just and fair. So, we are treating with a just and fair standard, it would appear.

The cases treating with this type of motion indicate that the defendant does not have a right to withdraw a guilty plea absent some challenge to the propriety or the due process minimal satisfaction of the Rule 11 hearing, and there would appear to be no challenge here that all of the requisite of Rule 11 were scrupulously followed by the court in the conduct of that proceeding.

So, the withdrawal by any defendant of his otherwise procedurally satisfactory entry of a guilty plea is a matter of privilege with lies within the sole discretion of the trial judge receiving the plea, and only an abuse of discretion on the part of the trial judge in denying such a privilege will constitute grounds for reversal upon appeal.

The burden of establishing the right to a presentence withdraw is understandably upon the defendant, although this burden is more related and a lesser one than were the defendant to make

such application post sentence or to satisfy the manifestly unjust requirements of motions for new trial and so on. So, that is the legal framework within which we must view this motion today.

I'm sure that no one — I'm not so sure I can say that. I was about to say no one looks upon the entry of a guilty plea to a federal criminal offense as something less than a grave and solemn act. I'm not so sure after hearing the testimony of the defendant this morning that he might not constitute an exception to that statement. The guilty plea is taken in open court and under oath as is required, and taken within the narrow frame of Federal Rule of Criminal Procedure 11, which mandates the procedures that must be followed. Certainly could not be characterized as a fleeting admission of guilt, but rather it is a procedure which seeks to employ a detailed interrogation of the defendant by the judge himself and under, once again, the stringent requirements of the rule to satisfy the court that the defendant knows what he is doing, understand his constitutional rights, understand the nature and consequences of his plea, and acknowledges a factual basis for that plea.

So, a guilty plea properly entered by these standards should not be permitted to be withdrawn absent a very good reason. And if that were not so, the scrupulous efforts of trial courts to determine the necessary prerequisites to the entry of a fair and just guilty plea would be meaningless. How could we ever operate under Rule 11 or otherwise?

Appendix A

A withdrawal motion such as this should be denied where the record shows that the plea was freely and understandingly entered. The defendant's change of mind between plea and sentence or his general indecisiveness about the wisdom of the guilty plea he has entered, or even his desire to put the government to its proofs in the hopes that they might not sustain their burden at the time of trial are, of course, by themselves insufficient reasons for the withdrawal of a guilty plea.

I do not gather, nor do I find from the record in this hearing, which incorporates, of course, the transcript of the Rule 11 proceeding as supplemented by the testimony of the defendant, that the record suggests that the plea was involuntary. It certainly wasn't the product of any compulsion or threats of any kind. It was a decision, as the defendant then acknowledged, of his own and not one that was thrust upon him in any sense.

The defendant seems to suggest that it was not understandingly entered, despite his testimony under oath to the contrary during the course of the Rule 11 hearing, and I gather that the absence of understanding in his mind related not really to that which was said to him by way of the court's questions and to which he responded, but rather that the lack of understanding arose by virtue of his interpretation of what his wife wanted him to do or what she conceived his position to be. It is very difficult for the court to understand and perceive, frankly.

Surely, a misunderstanding or a lack of understanding by a defendant of his constitutional rights, of his options of a trial by jury and the nature of the charge with which he was confronted, or the consequences of his actions in entering the guilty plea would entitle him to withdraw, no question about that. Be horrible to hold him to a guilty plea if it were the product of such misunderstandings. But the bare and unsupported statement of an accused that he was confused or lacked an understanding of the consequence of the charges due not to any misrepresentation or lack of understanding of what his attorney said or advised him or what the court said or advised him, but rather what his wife said either verbally or non-verbally in some emotional context surely constitutes no entitlement to relief such as that which is sought here.

The court is constrained under the circumstances such as this by our case law in the federal courts to scrutinize the credibility of the claim of the defendant seeking to withdraw his guilty plea in light of his timeliness and the record of the guilty plea. And if the present claim of the defendant is conclusively negated by the files and record, it should be denied. Determination of what is just and fair must be made from all of the circumstances in this case, and not merely by determining what is fair and just from the defendant's point of view. His point of view, of course, is of critical concern to the court, but it is not the only area of concern. There are competing interests involved in the entry in our courts of a guilty plea under proper

and appropriate circumstances to charges brought on for trial and disposition by a federal grand jury.

Well, we have our presentence withdrawal standards, one of which is: a significant period of time passed between the entry of the guilty plea and the filing of the withdraw motion? Well, I must say in this case if the defendant had a consciousness of the error of his ways in entering a guilty plea and of the misunderstanding of the penalty to which he was possibly — it is an interesting word that he employs to modify his understanding of the sentence he was to receive, but if he had a misunderstanding as to the sentence to which his guilty plea had exposed him, this awareness apparently did not make itself known sufficiently to communicate his change of mind to his attorney until two or three days prior to October the 24th. The sentencing date being October the 26th, only two days after the 24th. So, compositly we're looking at a period of communicated change of mind of approximately 4 to 7 days prior to the date of sentence, despite the fact that the plea which was, we are led to believe, erroneously entered as a result of a misunderstanding as to the penalty exposure, that plea having occurred on September the 17, 1979. So, this might not literally but otherwise be characterized as an 11th hour awareness.

Another criteria is whether the defendant asserts that he is innocent of the charges. Well, there was nothing in his affidavit in support of this motion to suggest that he was innocent of the

charges, I don't believe. There was certainly nothing to suggest in his sworn answers to this court during the Rule 11 Procedure when his guilty plea was taken to remotely suggest that innocence. It was not, indeed, until the defendant disclaimed his guilt here today that we were aware of that innocence. It is very difficult to conceive how an individual of the most modest education and intelligence could fail to understand the precise non-legalistic factual questions that were specifically addressed to this defendant during the course of his hearing. And I guess he is not saying that he didn't understand those questions. I guess what he is saying is that he understood them but he lied repeatedly.

The court is asked to believe that those responses now are lies, and presumably the court is asked to believe that they were lies because in placing upon the public record an admission of guilt of a federal crime carrying a statutory maximum of 5 years imprisonment plus a fine, that this in some strange way secured to himself the assurance of a non-custodial sentence. Incredible. And this in the absence of his attorney saying so or representing or promising or assuring him of such a thing, and in the face of the court telling him what the maximum was. It certainly stretches one's credulity.

He admits point by point all of the essential elements of the crime to which he pled guilty. Once again, another criteria for a presentence withdrawal of his guilty plea is whether or not the guilty plea complied with the requirements of Rule 11. I reviewed the transcript, I have no

pride of authorship, but I think it's quite clear from the transcript that all of the requirements of Rule 11 were complied with in this case, and if I understand the position of the defendant correctly, he does not challenge that satisfaction.

Additional criteria for decision is whether or not the government would be prejudiced by the withdrawal. I have, of course, which will be made a part of this record, an affidavit of Mr. McKay on behalf of the government seeking to establish to the court's satisfaction that the granting of this motion and the consequent delay in the trial time and the need for the reassembling operation of witnesses and proofs would constitute prejudice to the government. I'm not completely sure how crippling that prejudice would be, but it is disturbing to recognize in this particular case that the apparent critical government witness, one Dominick "Nicky Beans" Mariano, the purported and alleged — I guess after the defendant's testimony during the Rule 11 hearing something more than an alleged or purported arson broker, that this man has been established before this court in other matters to be in precarious health. The government's affidavit seems to suggest and support the conclusion that the government's key witness, Mr. Mariano, continues to be in very precarious health. Raising questions, I suppose, reasonably as to his continued availability for testimony at trial. He has testified before this court, before me, in other mail fraud cases arising out of arson, and the court is not unaware personally of evidences of his various disabilities. I seem to recall reviewing medical letters in the past directed to the subject of the precarious health of the government's key witness.

Appendix A

My denial of this motion, and it will be a denial, and it is a denial of this motion, is not dependent in any way upon my acceptance of the government's assertion of resulting prejudice. Nor upon the continued availability of Mariano or not. I think it quite clear that this application is without merit. The position of the defendant is largely incredible, given the record in this case, and even his responses here today, as compared to his responses not only before in the Rule 11 hearing but to other responses that he has given today.

In short, this court finds that the presentence withdrawal standards which have been applied by the court to the record here compel a denial of the application of the defendant for withdrawal of his guilty plea entered in September of this year, and that the granting of this motion would not constitute a fair and just resolution of the motion under the circumstances and the record here present.

The motion will be denied." (T79-4 to T90-17).

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2665

UNITED STATES OF AMERICA

v.

JOHN F. FARRI, JR.,

Appellant

Appeal from the United States District Court
for the District of New Jersey
Crim. No. 79-00081

Submitted Under Third Circuit Rule 12(6)
May 19, 1980

Before: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

After considering the contentions raised by appellant, namely, that the trial court's denial of defendant's notice of motion to withdraw his plea of guilty before sentence was an abuse of discretion where defendant claimed he was innocent of the charges, and there was no finding of prejudice to the government, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Appendix B

BY THE COURT,

s/ Arlin M. Adams
Circuit Judge

ATTEST:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: MAY 27, 1980

APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at page 17, line 2]

"Mr. Farri: Thank you, your Honor, I'd like to start from the beginning. On that morning of September in question, my wife and I were present to come before you and the jury —

The Court: You had both your attorneys there that morning?

Mr. Farri: Yes, your Honor. And there was a lot of running around going on and with my attorney and Mr. McKay. And they came out and they asked me my opinion on the deal with the — pleading guilty. And I says, 'No, I'm not pleading guilty, I'm not guilty and I'm not pleading guilty.' So, a little later on, more running around back and forth took place, and my attorneys come out and —

The Court: Excuse me, I apologize for interrupting you. Excuse me, go ahead, Mr. Farri, I apologize.

Mr. Farri: Yes, your Honor. My attorneys asked me, he says, 'Mr. McKay has a deal.' I shouldn't say he told me that he had a deal. And the deal is that. 'And [18] the deal is that you plead guilty to one charge and you go home.' So — 'You don't serve any time.'

So, with that my wife was present and — I should rephrase that: 'You could go home.'

The Court: Who said that?

Mr. Farri: One of my attorneys, I forget which one it was, your Honor.

The Court: Either Mr. Avena or Mr. Ergood?

Mr. Farri: Right.

The Court: — said to you that if you agreed to plead guilty —

Mr. Farri: Right.

The Court: — in exchange for that — to the first count alone, the government would agree to dismiss the other count, is that what they said?

Mr. Farri: That's correct, your Honor.

The Court: And also that you would not — You would not be sentenced to any time and that you would go home free, [19] is that the idea?

Mr. Farri: Possibly.

The Court: Possibly?

Mr. Farri: Yes.

The Court: Oh, possibly was part of it?

Mr. Farri: Yes. In other words —

The Court: Tell us to the best of your recollection just what was said to you and by whom.

Mr. Farri: Well, like I said, your Honor, that the — there was a lot of — a lot of excitement going on there, and I kept my ground and was saying, 'I am not guilty,' which I am not. And my wife got hysterical and said, 'do whatever they want. I want you home.' So —

The Court: And why did you understand she said that? Because had she also heard the attorney say to you that possibly you would go home if you entered into this plea bargain or that you would go home?

Mr. Farri: Your Honor, we [20] took it that we were going home together. And that's —

The Court: And you both — you say it was your understanding and your wife's understanding that if you entered into this plea bargain —

Mr. Farri: I was going to go home.

The Court: — that part of the deal would be that you and your wife would go home and you wouldn't have to serve any time?

Mr. Farri: Correct.

The Court: Is that right? Now, did the going home mean that you would be able to go back to California? That's where you were living at the time?

Mr. Farri: That's right, your Honor.

Appendix C

The Court: That you would be able to go home after entering this plea but that you would have to come back for sentencing and perhaps have to be sentenced to time later on ?

Mr. Farri: I don't really. . . ."

[Commencing at page 22, line 1]

"Did the attorneys indicate to you directly or indirectly at any time that if you entered into this agreement to plead guilty that there would just be a fine?

Mr. Farri: No, your Honor, they did not.

The Court: Never said that to you.

Mr. Farri: And so with that, my wife, I told her, 'No, I'm not pleading guilty to something I didn't do.' And she got hysterical. So I said okay. She told me to plead guilty to anything just as long as I come home. And I swear to God that's the truth.

The Court: Well, Mr. McKay, I would think that if this defendant had chosen to take the witness stand and to testify in the same substance in response to questions put to him by his attorney, Mr. Avena, that the government would have the right to address questions to him on cross-examination.

Mr. McKay: Yes, sir.

The Court: And I feel that. . . ."

Appendix C

[Commencing at page 58, line 1]

"Q. You have it. A. I wasn't trying to make a mockery of anyone by saying that, however, I wasn't looking at it as a lie, I was looking at it as salvage for me and my wife and my kids.

Q. But, Mr. Farri, you were told by the judge that you could get five years for pleading guilty. A. Un-Hun. I was under the understanding though, Mr. McKay, that I was going home.

Q. This understanding was arrived at solely by virtue of your wife's happiness? A. Happiness and there was so much going on, Mr. McKay, to be honest with you, I hadn't had no sleep or anything else, and I couldn't be honest in telling you what else took place, but I remember my wife's happiness when she came out and she said, 'Say anything they want to hear, tell Mr. McKay anything he wants to hear, just as long as you come home with me and the kids.'

Q. Now, you were told by the judge that you were under oath in answering the questions, isn't that true?"